
Supreme Court of the United States

October Term, 1941

No. 323

MUNCIE GEAR WORKS, INC. and
BRUNS & COLLINS, INC.,
Petitioners,

vs.

OUTBOARD, MARINE & MANUFACTURING
COMPANY and JOHNSON BROTHERS
ENGINEERING CORPORATION,
Respondents.

**PETITION OF MUNCIE GEAR WORKS, INC., AND
BRUNS & COLLINS, INC., FOR A WRIT OF CER-
TIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, WITH AFFIDAVIT
AND BRIEF IN SUPPORT THEREOF.**

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FLOYD H. CREWS,
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PETITION OF MUNCIE GEAR WORKS, INC., AND BRUNS & COLLINS, INC., FOR A WRIT OF CER- TIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

*To the Honorable, the Chief Justice and Associate
Justices of the Supreme Court of the United
States:*

Your Petitioners, Muncie Gear Works, Inc., and Bruns & Collins, Inc., respectfully pray for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit to review the judgment of that Court entered on the 29th day of January, 1941 (petition for rehearing denied May 16, 1941). A transcript of the record in the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with the rules of this Court.

Summary and Short Statement of the Matter Involved.

1. Respondent, Johnson Brothers Engineering Corporation, is the owner of, and respondent, Outboard, Marine & Manufacturing Company, is the exclusive licensee under Johnson Patent No. 1,716,962, granted June 11, 1929, for an alleged invention in "Water Propulsion Device" (a so-called outboard motor demountably attached to a rowboat or the like to propel it by power).

2. Petitioner, Muncie Gear Works, Inc. is an Indiana corporation with its factory located at Muncie, Indiana, and is engaged, *inter alia*, in the manufacture of outboard motors. Petitioner, Bruns & Collins, Inc., is an Illinois corporation engaged at its place of business at Chicago in the sale, *inter alia*, of outboard motors manufactured by Muncie.

3. Respondents instituted infringement suit against petitioners on claims 11, 12, 13 and 14 of the Johnson patent in the United States District Court for the Northern District of Illinois, Eastern Division, by reason of the manufacture and sale of the Muncie outboard motors. Petitioner, Muncie Gear Works, waived its jurisdictional privilege, and assumed the defense of the case.¹

4. The patent discloses (R. 340) the usual, well known outboard motor, consisting of an engine; a propeller and

¹ This suit also included two additional Johnson patents (R. 12), and the litigation included a companion suit involving 5 additional patents (R. 2). By stipulation the two cases were consolidated and tried as one on a single record as to seven of the total of eight patents involved, one patent having been withdrawn prior to trial. The Courts below disposed of six of the seven patents adversely to the patents, so that the present petition is concerned only with the single Johnson patent above identified.

drive shafts connecting the two; a drive shaft casing; a water conduit extending from below the water surface to the water jacket of the engine, for cooling the engine; an anti-cavitation plate;² means for turning the device for steering purposes; and means for attachment to a boat. Each and every one of these elements concededly was very old in the art prior to Johnson (R. 621). In addition thereto, there is shown extending to the rear of the propeller blades what is termed by the patent a "deflecting plate" (No. 19 of the drawing, R. 340). This plate is supported by a portion of the drive shaft casing which arches over the propeller blades. *This deflecting plate, and its arching support, not present in Petitioners' devices, were the only things advanced as Johnson's invention, and the only things (in combination with the other elements of the complete outboard motor) claimed as constituting the invention in the application for patent as originally filed on August 25, 1926.*

5. *More than two years and seven months after the application was filed (to wit: on March 30, 1929) the claims which issued as claims 11, 12, 13 and 14 of the patent, and here involved, by amendment were added to the case and the specifications were amended by the addition of subject matter not theretofore contained in the application, and to which subject matter the said claims were directed (see the certified copy of the File History, Defendant's Exhibit I, physical, p. 35). These claims define a wholly different invention from that claimed by the application as originally*

² The term "cavitation" is used to describe the drawing of air, by action of the propeller, from above the surface of the water to the propeller itself—an undesirable effect. Therefore, an "anti-cavitation" plate consists merely of a flat plate horizontally positioned above the propeller, and between the propeller and the surface of the water, to act as a baffle and prevent the action of the propeller from drawing air thereto from the surface of the water.

filed, and had no supporting description in the specifications as originally filed, and do not include the deflecting plate and its arching support.

6. By respondents' own evidence it is established that this new subject matter, and these claims directed thereto, were not added to the Johnson application *until more than two years after extensive commercial adoption of structures embodying such subject matter* (R. 43, 225).

7. Respondents asserted, and the Court of Appeals below held (R. 621) that these claims advance as the invention of the patentee the "streamlining" of a drive shaft casing having an anti-cavitation plate, to minimize the resistance of the casing passing through the water.³ As before stated, this subject matter did not appear in and was not claimed as the invention by the application as originally filed, and finds support, if at all, only in the subject matter injected in the application by amendment on March 30, 1929—more than two years and seven months *after* the application was filed.

8. In fact, however, as even a casual examination of the claims will reveal, all four of the claims are expressly directed to an alleged combination of *all* of the various individually old elements necessary to form a complete outboard motor structure, *and the patent drawings do not show, nor do the patent specifications state what constitutes a "streamlined" structure, or afford any measure by which one could determine what would be within or outside of the scope of the claims if construed as the Court of Appeals below construed them.*

³ As a matter of fact, however, none of these claims mentions a "streamlined" structure. Claim 12 merely recites a housing having "unbroken outer wall surfaces at each side extending upwardly", and claim 14 describes the casing as having "smooth and unbroken walls". Claims 11 and 13 are both silent on the subject.

9. Without going into the questions presented by the belated and illegal amendment of the application, the District Court found the Johnson patent to be wholly lacking of novelty in means or result, and invalidly aggregational for the obvious reason that there was no patentable cooperation between streamlining a drive shaft casing and an old anti-cavitation plate, or with any of the other old elements that go to make up an outboard motor structure as catalogued in each of the claims. The District Court expressly pointed out that there was nothing *new* about what the elements did, and that there was nothing *new* about the result which they brought about (R. 243, 244); and thereupon made appropriate findings of fact, and entered conclusions of law consistent with its opinion (R. 293, 296).⁴

10. The Court of Appeals, after expressing doubt as to whether the patent disclosed any invention at all (R. 621), substituted its judgment for the fact findings of the Court below, reversed the decree of the District Court, and found validity for the patent. In doing so, the Court of Appeals found patentable coordination between "streamlining" and the use of an anti-cavitation plate, and completely ignored the fact that these two features *alone* were not the alleged combination recited by the claims, but that, to the contrary, *each* of the claims sued on recites *numerous other essential elements of a complete outboard motor structure*. In no way, except by result, did the Court of Appeals disturb the District Court's finding of aggregation when considering *all* of the elements of *each* of the claims.

⁴ It should be noted that the District Court's decision invalidating the patent was rendered despite a prior favorable adjudication (in 1934) by a District Court in a suit in Michigan against a small manufacturer which is no longer in the outboard motor business, in which case no appeal was taken (*Johnson Bros. Engineering Corporation, et al. v. Caille Bros.*, 8 Fed. Supp. 198). The Court of Appeals below commented that this fact "greatly weakened" the presumption which otherwise would be raised by the prior adjudication (R. 621).

11. The reversing judgment of the Court of Appeals was expressly induced (R. 621, 622) by the "commercial success" claimed by respondents for the alleged "invention" of the patent as respondents defined it. This "commercial success" was founded solely upon respondents' evidence (R. 42, 43, 225) that *all motors in the industry of the type involved in the litigation were streamlined, and employed anti-cavitation plates, and this includes the motors on the commercial market more than two years prior to the injection into the Johnson application of the claims in suit, and the subject matter to which they are directed—a fact which the Court of Appeals completely ignored.*

12. It is a conceded fact that for the many years that streamlining any moving structure has been in vogue, outboard motors have been streamlined, so that, so far as is known, *all* outboard motors made today of the type here involved are so constructed (R. 42, 43, 225). Therefore, the Johnson patent as sustained by the Court of Appeals assertedly and concededly completely dominates the entire outboard motor industry.

13. Moreover, the entire industry (with the exception of one small manufacturer, Champion Motor Co., which is licensed under the patent [see R. 43]) is concentrated within the jurisdiction of the Seventh Circuit, so that there is no likelihood of further adjudication of the patent hereafter.

14. Therefore, because the Court of Appeals for the Seventh Circuit has sustained as valid a patent which the Court expressly recognized as being of doubtful validity, but which, nevertheless, dominates an industry concentrated within the jurisdiction of that Court so that litigation elsewhere with a resulting conflict of opinion is improbable, this petition for a writ of certiorari has been presented.

Reasons Relied Upon for the Grant of a Writ of Certiorari.

The discretionary power of this Court is invoked upon the following grounds:

1. Because the Court of Appeals for the Seventh Circuit has sustained as valid a patent which assertedly and concededly dominates and controls an entire industry, which industry (with the exception of one small licensee under the patent) is concentrated within the Seventh Circuit, whereby litigation elsewhere, with a resulting conflict of decision is improbable.

2. Because the Court of Appeals for the Seventh Circuit has sustained as valid claims which define an invention different from that described in or claimed by the patent application as filed, and which claims, as well as the subject matter thereof, were inserted by amendment into the application more than two years and seven months after the application was filed, and more than two years after commercial adoption by the industry of the alleged invention defined thereby. This holding is untenable because it is in direct conflict with the applicable decisions of this Court.

3. Because the Court of Appeals for the Seventh Circuit has sustained as valid a patent for an alleged combination which is unpatentably aggregational on its face, thereby rendering a decision which is untenable because it is in direct conflict with the applicable decisions of this Court.

WHEREFORE your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Court, directed to the United States Court of Appeals for the Seventh Judicial Circuit, commanding said Court to certify and send to this Court, on a date to be designated, a full transcript of the record and all proceedings of the Court

of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, as to the questions herein presented as well as to the questions of anticipation and invention, and that the judgment of the Court of Appeals be reversed insofar as it found validity for Johnson Patent No. 1,716,962, and that petitioners may be granted such other and further relief as may seem proper.

Respectfully submitted,

SAMUEL E. DARBY, JR.,
Counsel for Petitioners.

CHARLES W. RUMMLER,
FLOYD H. CREWS,
of Counsel.

Dated: New York, N. Y.,
July 29, 1941.

Affidavit in Support of Petition for Writ of Certiorari.

COUNTY OF DELAWARE }
STATE OF INDIANA } ss.:

WILEY W. SPURGEON, being duly sworn, deposes and says that he is of legal age, and is the Secretary-Treasurer of petitioner, MUNCIE GEAR WORKS, INC.;

That he knows the names and addresses of the various manufacturers of outboard motors sold in competition with the products of his company; and that the entire industry is concentrated in the States of Wisconsin, Illinois and Indiana—within the Seventh Judicial Circuit of the United States—with the exception of one small manufacturer in Minnesota (which manufactures the “Champion” outboard motor), which manufacturer is licensed under the Johnson Patent No. 1,716,962, involved in this case.

WILEY W. SPURGEON.

Sworn to and subscribed before me }
this 28th day of July, 1941. }

L. F. LIVINGSTON
Notary Public

(SEAL)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the District Court was rendered orally at the conclusion of the trial, and is not reported, but will be found beginning at page 242 of the record.

The opinion of the Court of Appeals for the Seventh Circuit is reported in 119 Fed. (2d) 404, and will also be found beginning at page 616 of the record.

Jurisdiction.

The grounds for jurisdiction are:

1. The date of the judgment to be reviewed is January 29, 1941; petition for rehearing denied May 16, 1941.

2. The judgment was rendered in a civil action brought under the patent statutes to determine the issues of validity and infringement of Letters Patent of invention.

3. The statute under which jurisdiction is invoked is 240(a) of the Judicial Code, 28 U. S. C. A. 347, as amended by the Act of February 13, 1925.

4. Cases believed to sustain the jurisdiction are:

Schriber-Schroth Co. v. Cleveland Trust Co., 305 U. S. 47;

Paramount Publix Corp. v. American Tri-Ergon Corp., 294 U. S. 464;

Altoona Publix Theaters v. American Tri-Ergon Corp., 294 U. S. 477.

Statement.

The facts are sufficiently stated in the petition.

Specification of Errors.

The errors which petitioners will urge if the petition for certiorari is granted, are that the Circuit Court of Appeals for the Seventh Circuit erred:

1. in sustaining the Johnson Patent 1,716,962 as valid.
2. in reversing the District Court's judgment that the Johnson patent is invalid.
3. in failing to invalidate the Johnson patent because of the illegal amendment thereof to claim subject matter not described or illustrated in the application as filed, and injected therein by amendment more than two years and seven months after the application was filed, and more than two years after said subject matter had been commercially adopted.
4. in failing to invalidate claims 11, 12, 13 and 14 of the Johnson patent as wanting in invention, and as being for unpatentable aggregations.

Summary of Argument.

The points of argument follow the reasons relied upon for the grant of a writ of certiorari, and are stated on page 7 of the petition, as well as in the index hereto. For the sake of brevity they are omitted at this point.

POINT I.

The Court of Appeals for the Seventh Circuit has sustained as valid a patent which assertedly and concededly dominates and controls an entire industry, which industry (with the exception of one small licensee under the patent) is concentrated within the Seventh Circuit, whereby litigation elsewhere with a resulting conflict of decision is improbable.

The entire industry is concentrated within the Seventh Circuit, with the exception of one small licensee under the patent (R. 43; see also affidavit *ante* p. 9).

Respondents asserted in the Court below (R. 42, 43, 225), and petitioners concede that all outboard motors of the type here involved employ a streamlined drive-shaft casing and an anti-cavitation plate, which, respondents assert, and the Court of Appeals held, constitutes the invention of the patent. In other words, the patent assertedly and concededly dominates the entire industry.

The District Court held the patent to be invalid, and the Court of Appeals expressed "doubt" as to the validity of the patent (R. 621). In consequence, in the words of this Court in *Schriber-Schroth Company v. Cleveland Trust Company*, 305 U. S. 47, at page 50, paraphrased, as indicated by italics, to apply to the outboard motor industry and a different judicial circuit, it is apparent that:

"* * * notwithstanding the doubtful validity of the patent, litigation elsewhere with a resulting conflict of decision (is) improbable because of the concentration of the *outboard motor* industry in the *Seventh Circuit*."

For this reason, therefore, certiorari should here be granted (see also *Paramount Publix Theatre Corp. v. American Tri-Ergon Corp.*, 294 U. S. 464; *Altoona Publix Theatres v. American Tri-Ergon Corp.*, 294 U. S. 477).

POINT II.

The Court of Appeals for the Seventh Circuit has sustained as valid claims which define an invention different from that disclosed in or claimed by the patent application as filed, and which claims, as well as the subject matter thereof, were inserted by amendment into the application for patent more than two and one-half years after the application was filed, and more than two years after commercial adoption by the industry of the alleged invention defined thereby. This holding is untenable because it is in direct conflict with the applicable decisions of this Court.

—Claims 11, 12, 13 and 14 are the only claims of the patent which are involved. These claims and the subject matter thereof were not presented in the application until March 30, 1929—*more than two years and seven months after the application was filed.*

Respondents asserted in the Courts below, and the Court of Appeals held, that the invention defined by these claims constitutes the cooperation between streamlining the drive shaft casing of an outboard motor, and an anti-cavitation plate formed on the casing (R. 621). This "invention" is radically different from and foreign to the invention disclosed and claimed when the application for the patent was filed in the Patent Office. All that was then disclosed or claimed as the invention consisted of a deflection plate (No. 19 in the drawing, R. 340) extending to the rear of the propeller, and supported by a part of the drive shaft casing extending as an arch over the top of the propeller blades (in combination with the other elements of a complete outboard motor). Neither by objects sought nor by results obtained was there any support for any *other* "invention".

in the specifications as filed. Specifically, there was not one word in the specifications, as filed, nor anything illustrated in the drawings, which constituted a disclosure, in any sense, of *streamlining* the drive shaft casing or any other part of the equipment, much less of any alleged cooperation between the streamlining of *any* part of the device with an anti-cavitation plate. With the presentation of the added claims here involved the specifications were also amended by the injection therein, for the first time, of the subject matter to which the claims were directed—and even then no information was given which would enable one to determine what would be or would not be a *streamlined* casing so as to come within or be outside of the patent (Cf. *General Electric Co. v. Wabash*, 304 U. S. 364).

Why the applicant made this radically different, new, and belated claim of invention, and injected this new subject matter in his specification, is made perfectly apparent by respondent's own evidence which establishes (1) that *there had been extensive commercial acceptance of this newly alleged "invention" by the industry for more than two years prior to the alteration of the patent application* (R. 43); and (2) all outboard motors of the type involved in this litigation being made today utilize this alleged "invention" (R. 42, 225). In consequence, the Johnson patent is an outstanding example of a patent applicant for *one* invention modifying and changing his statement of invention, years after his application was filed, for the apparent purpose of appropriating and claiming what had been developed or commercially adopted in the interim to thereby illegally dominate the art.

This Court has frequently and emphatically stated that this may not legally be done. (*Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47, 57; *Mackay Radio & Telegraph Co. v. Radio Corporation of America*, 306 U. S.

86, 101; *Chicago and N. W. R. Co. v. Sayles*, 97 U. S. 554, 563; *Powers-Kennedy Contracting Corp. v. Concrete Mixing and Conveying Co.*, 282 U. S. 175, 185.)

It is believed to be obvious, therefore, that the decision of the Court of Appeals below is untenable because it is in direct conflict with the applicable decisions of this Court.

POINT III.

The Court of Appeals for the Seventh Circuit has sustained as valid a patent for an alleged combination which is unpatentably aggregational on its face, thereby rendering a decision which is untenable because it is in direct conflict with the applicable decisions of this Court.

Although the District Court found all four of the claims of the Johnson patent to be invalid because of their aggregational character, the Court of Appeals reached a different conclusion because it found "cooperative relationship between the anti-cavitation plate and stream-lining of a portion of the outboard motor structure" (R. 621). In reaching this conclusion the Court of Appeals ignored, or completely overlooked the fact that the four claims of the patent here involved purport to cover no such thing. To the contrary, the claims are for a combination of a large number of elements, of which a "streamlined" casing for the drive shaft, and an anti-cavitation plate are merely two. Referring to claim 11 as an example, this claim consists of the combination of *eleven individual elements*, including such things as the engine, a conduit for supplying water to the water jacket around the engine, etc. It is submitted that by no stretch of the imagination, or by legal reasoning, is there the slightest patentable coordination or cooperation between

a gas engine, its cooling water jacket, and a pipe or passage for supplying water to the water jacket on the one hand, and a streamlined drive shaft casing, or an anti-cavitation plate on the other hand. Obviously, therefore, the claims, as held by the District Court, are mere invalid aggregations. The Court of Appeals in holding otherwise, therefore, has rendered a decision which is untenable because it is in direct conflict with the applicable decisions of this Court. (*Powers-Kennedy Contracting Corp. v. Concrete Mixing and Conveying Co.*, 282 U. S. 175, 186.) As this Court stated in that case (at p. 186):

“For these reasons we find that the patent is invalid. It consists of a combination of elements all of which were old in the art. Its application to the transportation of concrete did not involve invention. Neither the combination of old elements or devices accomplishing no more than an aggregate of old results (*Hailes v. Van Wormer*, 20 Wall. 353, 22 L. ed. 241; *Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co.*, 174 U. S. 492, 43 L. ed. 1058, 19 S. Ct. 641; *Grinnell Washing Mach. Co. v. E. E. Johnson Co.*, 247 U. S. 426; 62 L. ed. 1196, 38 S. Ct. 547), nor the use of an old apparatus or appliance for a new purpose (*Roberts v. Ryer*, 91 U. S. 150, 23 L. ed. 267), is invention.”

If, in fact, there is coordination between an anti-cavitation plate and a streamlined drive shaft casing of which it forms a part (and this is denied), and the forming of an anti-cavitation plate as an integral part of a streamlined casing constitutes a patentable invention (and this, likewise, is denied), then it becomes apparent that the claims of the Johnson patent here involved are invalid because that is not what is claimed thereby. To the contrary, they claim the old exhausted combination of elements going to make up an outboard motor, of which such presumed invention

is merely one element. This, likewise, repeatedly has been held by this Court to invalidate the claim. (*Lincoln Engineering Co. v. Stewart-Warner Corp.*, 303 U. S. 545, 549. As this Court stated therein (at p. 549):

“As we said of Gulborg in the Rogers Case, having hit upon this improvement he did not patent it as such but attempted to claim it in combination with other old elements which performed no new function in his claimed combination. The patent is therefore void as claiming more than the applicant invented. The mere aggregation of a number of old parts or elements which, in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention and the improvement of one part of an old combination gives no right to claim that improvement in combination with other old parts which perform no new function in the combination.”

Therefore, in view of the foregoing facts, in sustaining the four claims of the Johnson patent as valid, the Court of Appeals for the Seventh Circuit has rendered a decision which is untenable because it is in direct conflict with the applicable decisions of this Court.

Conclusion.

Wherefore, Petitioners earnestly pray that the petition for writ of certiorari be granted, the case be reviewed, and the decree of the Court of Appeals for the Seventh Circuit finding validity for Johnson Patent No. 1,716,962, be reversed.

Respectfully submitted,

SAMUEL E. DARBY, JR.,
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CHARLES W. RUMMLER,
FLOYD H. CREWS,
of Counsel.

Dated, New York, N. Y.,
July 29, 1941.